IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs May 16, 2006

# STATE OF TENNESSEE v. EDYSON RAFAEL ARIAS

**Direct Appeal from the Criminal Court for Hamilton County**
**No. 243553 Douglas A. Meyer, Judge**

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**No. E2005-01700-CCA-R3-CD - Filed August 9, 2006**

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A Hamilton County jury convicted the Defendant, Edyson Rafael Arias, of first degree premeditated murder, first degree felony murder, attempted especially aggravated burglary, and theft of property valued over $10,000. The trial court merged the first degree murder convictions and sentenced the Defendant to an effective sentence of life plus six years. On appeal, the Defendant contends that: (1) the trial court erred when it failed to instruct the jury on the lesser-included offense of voluntary manslaughter; (2) the trial court abused its discretion when it denied the Defendant's motion for a change of venue; (3) the trial court erred when it admitted a knife set found at the victim's home and certain photographs of the victim into evidence; and (4) the trial court erred when it sentenced him. Finding that there exists no reversible error, we affirm the judgments of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed**

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and NORMA MCGEE OGLE, JJ., joined.

Myrlene R. Marsa (on appeal) and Cynthia A. Lecroy-Schemel (at trial), Chattanooga, Tennessee, for the appellant, Edyson Rafael Arias.

Paul G. Summers, Attorney General and Reporter; David E. Coenen, Assistant Attorney General; William H. Cox, III, District Attorney General; and Rodney C. Strong, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION
## I. Facts

This case arises from the Defendant's convictions for first degree premeditated murder, first degree felony murder, attempted especially aggravated burglary, and theft of property valued over $10,000, all crimes committed against the victim, Jill Henderson. The following evidence was presented at the Defendant's trial: Ron Fender, an outreach case manager at St. Matthews Shelter for Men, testified that the Defendant entered St. Matthew's VIP program for alcohol and drug

treatment and lived at the St. Matthew's shelter. He said that when the Defendant first came to St. Matthews, in January or February of 2003, he was compliant with the program, but, as time progressed, he became argumentative and volatile. Fender explained that the Defendant told him that the Defendant was seeing a woman, but he did not offer the woman's name. The Defendant described the woman he was seeing "in graphic physical terms," calling her a "fat b*tch" or a "blonde b*tch," and he told Fender that she worked at the homeless health care clinic. Fender testified that he knew the victim, Jill Henderson, professionally and that she was the only person fitting this description who worked at the homeless health care clinic. Fender said that the Defendant also told him that he thought that he was in a committed monogamous relationship with the woman he was seeing but that she was also seeing someone else. The Defendant indicated that his girlfriend had offered him money not to disclose their relationship, and there was some issue of drugs between them. Fender testified that the Defendant seemed upset about several situations pertaining to his relationship and that there was "a lot of drama surrounding his relationship at that point."

Fender explained that the Defendant wanted the victim to get fired and that he wanted a bus ticket to New York. Fender testified that the Defendant had some arguments with men at St. Matthews who had seen the Defendant with the victim in the victim's car. Fender explained that he personally felt that the Defendant should not continue to live at the shelter because the Defendant became increasingly hostile and volatile, and other men at St. Matthews felt very uncomfortable around the Defendant. Fender testified that the Defendant was kicked out of the homeless shelter towards the end of February of 2003. Fender said that he saw the Defendant on March 6, 2003, the Thursday before the victim was murdered, and the Defendant told him, "The fat b*tch is coming down." Fender testified that, a few days later, the director of the homeless health care clinic told Fender that the victim did not come to work, and Fender immediately recalled that he had seen the Defendant a few days prior.

On cross-examination, Fender testified that he gave his supervisor a memo that detailed some of the issues that he discussed with the Defendant. He testified that, in this memo, he did not identify the victim as the woman that the Defendant dated, and he did not provide any of the woman's physical descriptions in this memo. Fender recalled telling a detective that the Defendant had told him that the Defendant wanted the victim to be fired, but he never heard the Defendant say he would kill the victim. Fender explained that he had not had any personal confrontations with the Defendant but that he had mediated confrontations between the Defendant and other St. Matthews clients. On redirect, Fender said the Defendant was discharged from the program because Fender feared for the safety of the other people at the shelter.

Monty Dean Flanagan testified that he dated the victim around the time of her murder, and the victim was very outgoing, happy all the time, and always smiling. Flanagan testified that he went on his first date with the victim on Saturday, March 8, 2003. He met the victim, who drove a black Rodeo, at around 4:00 p.m., had dinner with her, and then went with her to a Days Inn in Ringgold, Georgia. The next morning, the victim took Flanagan to his home around 7:00 or 7:30 a.m., and he thought that she then went back to her own house and would have arrived there at around 8:00 or 8:30 a.m. He testified that he called the victim's house throughout the day, but no one answered the

phone. On cross-examination, Flanagan testified that he did not think that he left any messages on the victim's answering machine.

Guillermo A. Calle testified that, on a Saturday in late February of 2003 at around 7 p.m., the Defendant asked him to drive the Defendant to Soddy-Daisy so that the Defendant could get some money from his girlfriend. Calle explained that he thought that the Defendant was going to get money for a hotel room, and Calle wanted to use the hotel shower. He explained that, after they arrived in Soddy-Daisy, he parked the car in a church parking lot, and the Defendant exited the truck, walked over the hill, and disappeared. Calle said that, five to ten minutes later, the Defendant returned and said that his girlfriend was not at her house. He said that the two men then left and went to meet the Defendant's girlfriend at a hotel downtown, but they never saw her, so they went to a phone where the Defendant said he had called his girlfriend. Next, the two men returned to the church parking lot. On the way there, the Defendant said a phrase in Spanish that was translated as, "I'm going to unload" or "let it out." Calle said that he thought that the Defendant meant that he was going to tell the girlfriend what was on the Defendant's mind, but he acknowledged that the phrase literally meant that the Defendant was going to unload on the victim. Calle recalled that the Defendant exited the truck, which was parked in the church parking lot, at around 8:30 p.m. Calle sat in the truck for an hour and a half, and then a sheriff made him leave the parking lot around 10:30 or 11:00 p.m. On cross-examination, Calle testified that the police originally questioned him as a suspect in the victim's murder, and they fingerprinted him.

Andy Brown, a detective with the Hamilton County Sheriff's Office, testified that he was working on patrol on March 8, 2003, when he received a call about a suspicious vehicle in the New Salem Baptist Church parking lot, which is located near the place where the victim's murder occurred. Detective Brown said that he saw Calle in the church parking lot at around 10:00 p.m., and Calle told him that he had dropped off his friend, who had gone to visit his girlfriend, and was waiting for him to return. Detective Brown testified that he documented this incident and that Calle's friend never returned. Detective Brown told Calle to leave and not to return, and, when the detective checked the area a few more times that evening, he did not see Calle again.

Kyle Cantrell, the victim's son, testified that at the time the victim was killed he was ten years old and lived in Soddy-Daisy near the New Salem Baptist Church. Cantrell said that he last saw his mother as she was getting into her car and going out on a date with her boyfriend, Monty Flanagan. Cantrell had known Flanagan for a couple of years and described him as a "pretty good" guy. Cantrell's mother told him that he was going to spend the night at his grandparents' house, and later that evening he left his grandmother's house and went to his mother's trailer to lock it. He said that he saw the Defendant on the porch, the Defendant asked him where his mother was, and he told the Defendant that his mother was on a date. Cantrell explained that, a few weeks prior, his mother had introduced the Defendant to him as her friend from New York and that, a week or two earlier, the Defendant was at his house. Cantrell recalled that the Defendant once accompanied him and his mother to a wrestling match.

Judy Henderson, Kyle Cantrell's grandmother and the victim's mother, testified that on the

night before this crime she knew that her daughter had left to go on a date with Flanagan. Henderson said that the victim called her, said that she wanted Cantrell to stay with Henderson, and asked them to make sure that the trailer was locked. Henderson testified that, around 10:00 p.m., Cantrell went to lock the trailer, which is about fifty to sixty yards from her house. She said that she stood on the back deck and watched Cantrell when he went to the trailer and that she saw a man on the steps of the trailer. She watched this man and Cantrell speak with each other and then walk down the driveway together. She asked Cantrell who the man was, and he said, "Rafael." Henderson recalled that this man wore a dark shirt with a big wide reflecting item on the front that was like "silver."

Henderson testified that, at around 8:00 a.m. the next morning, she saw the victim driving her Isuzu Rodeo about a half mile from the victim's house, but at around 8:45 a.m., the victim's car was not at her house. She thought that the victim had gone to the store, but around noon she became concerned about the victim's whereabouts because the victim was supposed to go to a wrestling banquet. Henderson said that Cantrell went to the trailer and tried to enter it several times during the day, and Henderson became concerned because Cantrell did not have any clothes to wear to school. She testified that they called the Soddy-Daisy police the next morning. She described how the police came to the house, they all entered the trailer, and she saw the victim lying in the trailer's computer room. Henderson testified that the police rushed everyone out of the trailer and secured the area. She testified that, after she was allowed to enter the trailer, she saw a shirt lying on the sofa that she recognized as the shirt the Defendant was wearing two nights before when he was on the victim's porch. She asked her other daughter where the shirt came from, and her other daughter told her that she and Henderson's son-in-law found the shirt in the back of the computer room's closet.

Lisa Gann testified that she was the victim's sister and that she, her sister, and her mother all lived in the same compound. She testified that she saw her sister's vehicle leave her trailer at around 8:37 a.m. on Sunday morning but that she could not see the driver of the vehicle. On cross-examination, Gann was asked about a statement that she gave to Detective Blake Daniel in which she wrote, "The last time I saw [the victim] was Sunday morning around 9:00 [a.m.], [when she] backed her car up and drove down the driveway." Gann explained that when she provided the detective with this statement she assumed that the victim was driving her car. She testified that she really did not remember what she wrote in her statement because she wrote the statement right after the victim's body had been discovered. Gann acknowledged that the car was approximately fifty or sixty yards away from her kitchen window.

Steve Gann, Lisa Gann's husband and the victim's brother-in-law, testified that he saw the victim's vehicle leave Sunday morning around 9:00 a.m., and he could not see who was driving the vehicle. He also said that the vehicle was worth about $10,000 or $11,000. He looked at a shirt introduced by the State and said that he found it in a closet in the victim's computer room about four feet away from where the victim's body was found.

Kimberly Birdsall testified that she dated the Defendant, that the Defendant is her son's father, and that she met the Defendant twelve years ago. She testified that the Defendant called her on Sunday, March 9, 2003, at around 10:00 a.m. Birdsall said that, initially, she could not

understand the Defendant when he called her because he was rambling and speaking quickly, and, while he generally speaks English very well, she cannot understand him when he is upset. She recalled that the Defendant told her that he needed help and some money to get out of Chattanooga. When Birdsall asked the Defendant what was wrong, he told her that "there was a girl missing and that he needed to get out of town." Birdsall said that she told the Defendant that she did not understand what a missing girl had to do with his need to get out of town. The Defendant told her that he knew the missing girl and that he had gone to a homeless shelter that morning where he learned that two detectives had been earlier to question him about the missing girl. She told the Defendant that the situation still did not make sense and that he would need to give her more information if he wanted her to help him. The Defendant began to cry hysterically and told her that men from the homeless kitchen told him that the girl was dead and that "they" were looking for him. Birdsall said that she asked the Defendant if he knew this girl, and the Defendant told her that the girl was someone from the homeless shelter whom he had been dating named "Jill."

Birdsall further testified that the Defendant wanted her to find out if Tennessee had the death penalty and to see if the news was covering this girl's death. Birdsall explained that, initially, she thought that the Defendant was telling her this story in order to get some money, and she could not find any information about the missing girl on the internet. Birdsall told the Defendant, "Well, why don't I just call down there and see . . . if it's true or not? Maybe somebody just doesn't like you and they're playing a nasty joke on you or something like that." Birdsall said that the Defendant told her not to call anyone in Tennessee, but she did call on Sunday. She said that, when she called, no one knew anything about a murder. Birdsall said that she spoke with the Defendant many times on Sunday and Monday, and, on Monday, she learned that a murder had occurred in Chattanooga. She recalled that she had left her number with the police department and that the police department called her. She explained that Detective Starnes spoke with her over the phone and that she told him about her phone conversations with the Defendant. Birdsall testified that the police asked for her to help them capture the Defendant. Birdsall explained that she flew to Nashville and drove with detectives from Hamilton County to New Orleans while she was having phone conversations with the Defendant. She said that the Defendant had her cell phone number, that he thought that she was coming to New Orleans to pick him up, and that he did not know that she was with detectives. She described how the Defendant told her to head south, but he initially did not tell her where he was located, and he finally told her to meet him at the Superdome where the police arrested him.

Stanton Kessler, the deputy medical examiner for Hamilton County and the associate medical examiner for the State of Tennessee, testified that he performed an autopsy on the victim from which he determined that the victim died from multiple stab wounds. He explained that, after examining the victim's wounds, he determined that the knife used to kill the victim had a serrated edge, which "means that there's saw teeth, and you can actually count the number of teeth per inch, gives you a periodicity, and this can be matched to a knife, if there's a knife to be matched to." Dr. Kessler described the victim's wounds, stating that the victim received some wounds on her hands that came from defending herself. Dr. Kessler explained that the victim suffered one fatal stab wound that went through her neck, which cut the victim's major neck vessels and the nerves in her neck that went to her heart. He described how this wound caused the victim to bleed to death and to suffocate

on her own blood.

Dr. Kessler further testified that the victim's fatal wound cut her carotid artery and that an individual with a cut to the carotid artery would probably bleed to death in less than ten minutes. When asked if anything could have been done to prevent the victim's death had someone immediately sought to render her assistance, Dr. Kessler explained that her life may have been saved if someone had clamped the victim's carotid artery shut but that performing this procedure on an individual may cause them to have a stroke. He testified that he could not determine the exact hour of the victim's death but that certain aspects of her body condition indicated that the time of her death was probably closer to the beginning of the twenty-four hour period that occurred after she was last seen alive.

Max Johnson, a patrol officer for the Hamilton County Sheriff's Department, explained that on March 10, 2003, he responded to a dispatch call and met Judy Henderson at the Henderson residence. He stated that he received the dispatch call at 9:16 a.m. and learned that he needed to make a missing person's report. He said that he spoke with Gann and Henderson about the victim and how long she had been missing. These women told him that they either needed to call a locksmith or needed to break into the victim's home. He described how he went to the victim's home and unsuccessfully tried to enter through the front door, so he proceeded to the back of the residence where he entered through the backdoor after unlocking it with a lock-blade knife. Officer Johnson testified that he, Henderson, Gann, and Cantrell entered the victim's residence. He said that he walked into the living room area, and Henderson followed him. Henderson reached over and opened a bedroom door that opened up into the computer room and then started screaming, "Jill! Jill!" Officer Johnson said that he stepped around Henderson and saw the victim lying face-down near the doorway. He checked the victim, and she appeared to be deceased, so he turned around and asked everyone to leave the residence. He said that he secured the house's backdoor, exited from the house's front door, and called for additional units and an ambulance. He testified that, once the ambulance arrived, he and one emergency medical technician ("EMT") entered the residence, and the EMT agreed that the victim had died.

Thomas N. Farmer, a detective with the Hamilton County Sheriff's Office, narcotics and special operations division, described how he worked with Birdsall and arrested the Defendant. He explained that he had several phone conversations with Birdsall and that she provided very specific details about this crime. He described how they had multiple phone conversations with the Defendant but were unsure of his exact location, and the detective attempted to track the Defendant's location by tracing a phone calling card the Defendant was using. From the phone calls, they were able to track the Defendant's movement across the southern border of Georgia, across Florida, and into New Orleans, and he and other investigators arrived in New Orleans five days after the murder occurred. Detective Farmer said that the investigators extracted information from the Defendant through his communications with Birdsall and that she told the Defendant that she could not give him money unless he told her where to meet him. Detective Farmer testified that the Defendant told Birdsall to meet him at the Superdome around 12:00 or 1:00 a.m., and the detective thought that the Defendant chose this time because the parking lot was vast, there were no other cars in the parking

lot or events at the Superdome, and that the Defendant thought that law enforcement would have a difficult time following Birdsall if she was working with law enforcement.

Detective Farmer described the procedure that they used to arrest the Defendant at the Superdome and explained that they took the contents of the Defendant's pockets and made a list of these items. He described how they took these items back to Chattanooga and examined the evidence. Detective Farmer testified that, at the time of the Defendant's arrest, the Defendant was wearing a Casio plastic watch, and Detective Starnes noted that there was a blood droplet on the watch. They packaged the watch and sent it to the Tennessee Bureau of Investigation ("TBI") Laboratory for forensic evaluation and examination.

Lieutenant Doug Wilson with the Hamilton County Sheriff's Office testified that he was assisted in processing this crime scene in March of 2003. He described how he and Detective Bill Johnson worked together to process the crime scene, how he collected fingerprints at the crime scene, and how he tried to "freeze" the crime scene and bring it into the courtroom. He testified that Detective Johnson prepared a diagram of the victim's house, and this diagram was not drawn to scale. Lieutenant Wilson identified various photographs that were taken of the interior of the victim's residence and a knife set in the corner of the kitchen counter, from which one knife was missing. Lieutenant Wilson also identified photographs of three soft drink cans, and he described how he collected the soft drink cans, assigned numbers to them to mark their positions, and then put the items that he collected in the property room at the sheriff's office. He further testified that these items were then sent to a lab and dusted for fingerprints. Lieutenant Wilson testified that he found a prepaid long distance phone card on the victim's back deck and that there was a crease in the middle of this card, explaining that someone could have made this crease by putting the card into a small crack and applying pressure to it in order to "jimmy" a lock.

Rodney Bowman, with the Hamilton County Sheriff's Department, testified that he runs the property section at the Sheriff's Department. He said that he went to New Orleans to pick up a black Isuzu Rodeo that was in the city's impound lot. He acknowledged that the car had been previously identified as belonging to the victim.

Barbara Diane Alder testified that she is a store manager at a Family Dollar store that sells cards used for prepaid phone calls, which she must run through a machine in order for them to work. After viewing the phone card that was found on the victim's back porch and being asked about the card, Alder testified that police brought her this card and asked her to determine when the card was sold. She said that she determined that the card had been sold on February 27th at 8:31 a.m. She explained that a video surveillance camera is located in her store and that it runs twenty-four hours a day, and she provided the police with the video camera recording from the date and time the card was sold. Alder testified that the video did not provide a clear picture of the individual who was buying the phone card but that the individual appeared to be wearing items of clothing that the Assistant District Attorney showed to her during her testimony.

On cross-examination, Alder testified that she did not sell the phone card at issue but that she

was present in the store on the day that the phone card was sold. She admitted that she could not determine if the individual in the video was a male or a female. She also said that she could not determine the color of the individual's clothing because the video of the purchase was filmed in black and white.

Robert James Otis testified that he has lived in New Orleans for his entire life and that he is the section manager for the City of New Orleans Department of Public Works, towing division, and he maintains records for vehicles that are towed by his division. On July 10, 2003, his department received a phone call about a black Isuzu Rodeo located at 1128 Erato Street, and a tow-truck driver picked up this vehicle because it had been abandoned. He looked at a map of downtown New Orleans, circled the area of the map that showed the location of the Superdome, and identified the location of Erato Street. He explained that, after he impounded the Rodeo, he learned that the Rodeo was stolen. On cross-examination, Otis admitted that he had no idea how the Rodeo got onto Erato Street.

Robert Starnes, a detective with the Hamilton County Sheriff's Office, testified that he was in charge of the investigation for this crime. He described how Detective Wilson and Detective Johnson collected a phone card from the crime scene, how he discovered that the phone card was purchased at a Family Dollar store in Chattanooga, and how he went to the Family Dollar and retrieved the receipt and the videotape of the phone card's purchase. He identified two soft drink cans that had been taken from the crime scene and said that he requested that the TBI crime lab examine these items. He identified a watch that had been taken from the Defendant and that he had examined. He described how he noticed a type of staining on the watchband and how he examined the watchband with a flashlight, which revealed that this staining was a bright red color. After conducting this examination, Detective Starnes determined that the substance on the watch band may be blood and submitted the watch to the TBI lab for testing.

Detective Starnes described how he worked with Birdsall during the course of the investigation. He testified that Birdsall informed him that she had spoken with the Defendant and that the Defendant had asked for Birdsall's help because a woman was dead, and the police were looking for him. Detective Starnes identified the major case prints that were made of the Defendant's fingerprints and the fingerprints that were taken of Officer Johnson.

On cross-examination, Detective Starnes testified that, when he began working on this case, Calle was a suspect. Detective Starnes testified that a man named David Evans called and provided him with information regarding this case. He said that, based upon the information that Evans provided, he tried to locate a person named Regina Faye Givens but could not find her. He testified that Evans did not have any evidence to back up the information that he provided but that Evans indicated that he was merely acting on a "hunch." He testified that he coordinated all of the different teams that were involved in arresting the Defendant but that he was not in New Orleans when the Defendant was arrested. He acknowledged that the law enforcement personnel did not find any keys to the black Isuzu Rodeo when they apprehended the Defendant in New Orleans. He further testified that, when the black Isuzu Rodeo was located, a backpack was not found inside the vehicle.

Defense counsel questioned Detective Starnes about bed sheets with bloodstains on them that investigators had collected under Detective Starnes's direction. Photographs of these bed sheets were entered into evidence. Detective Starnes testified that these bed sheets were not sent to the TBI crime lab for testing and that he originally collected these sheets as evidence as a precaution in case the victim had been involved in some sort of sexual activity. He explained that he did not send the sheets to the TBI crime lab after he learned that there were no signs that the victim had been involved in any sexual activity. When defense counsel questioned Detective Starnes further, he acknowledged that his explanations did not negate the fact that the sheets had blood on them, but they were not tested.

Detective Starnes explained that he was not aware of any other items that were reported as missing or stolen from the victim's residence. He acknowledged that the investigation of the crime scene did not uncover any pry marks indicating that a forced entry into the home had occurred. He further testified that he believed that the card found lying by the backdoor could have been used to gain entry into the residence.

On redirect examination, Detective Starnes explained that when he first saw the victim's bed, the bed was actually covered with other bed sheets, and the blood stains did not show. He said that he pulled the sheets down and he discovered a substance on the bed. He further explained that he found the sheets in the victim's master bedroom, which is located at the opposite end of the residence from where the victim's body was discovered. Detective Starnes identified the location where the victim's body was discovered in the computer room and photographs of that location that showed blood in which the victim was found lying. Detective Starnes testified that a "pretty good bit of blood" was in the area around the victim's body. He testified that no evidence indicated that the spotting on the sheets had anything to do with the case and that the spotting might have been the result of a normal bodily function.

On recross examination, Detective Starnes testified that the red substance he had found on the Defendant's watch was inside the watch's holes, and he did not have any idea how the blood got inside the watch's holes. He said that based on the lab results, he believed the substance inside the watch's holes was the victim's blood. Detective Starnes said that he knew that the Defendant and the victim had been places together but did not know if they were sexually involved with each other. He testified that, during the course of his investigation, he became aware that the Defendant had been inside the victim's home on prior occasions.

On redirect examination, Detective Starnes clarified that he learned that the Defendant had been inside the victim's home a few weeks before the murder occurred. He testified that he believed that the blood was transferred from the victim to the Defendant's watch when the Defendant killed the victim. On recross examination, Detective Starnes explained that his belief about how the victim's blood got into the holes of the Defendant's watch was his opinion as an investigator with training and experience backed by lab results.

David Hoover, with the TBI latent print unit, identified the Defendant's inked fingerprints

and explained that these prints were actually rolled from the Defendant's fingers, palms, and hands. He testified that he found four identifiable fingerprints left on a Pepsi can that was taken from the victim's residence. He testified that all four of these fingerprints came from the Defendant.

On cross-examination, Agent Hoover acknowledged that, when investigating this case, he examined numerous pieces of evidence and did not find any other fingerprints that belonged to the Defendant. He said that he did not process the Isuzu for fingerprints but that he received fingerprint "lifts" and an "AC" knob from the Isuzu. He testified that he could not find any valuable prints to compare with the Defendant's fingerprints on the materials that he received from the Isuzu. On redirect examination, he reiterated that he did not process the Isuzu himself, and the materials that he received from the car did not have any identifiable prints on them. The latent prints and the Defendant's fingerprints were entered into evidence.

Charles Hardy, a TBI forensic scientist agent in the serology and DNA unit, described how he can take DNA from blood stains, semen stains, and saliva stains and compare that DNA with DNA taken from a known individual. He testified that he received the victim's blood from the medical examiner and the coroner involved in this case. He also testified that he retrieved blood from a watch that had been taken from the Defendant. Agent Hardy testified that he compared the DNA from the blood on the watch to DNA from the victim's blood and to DNA from the Defendant's blood. Agent Hardy testified that "the DNA profile is consistent with a mixture of genetic material from at least three individuals," but the victim was the major contributor to the blood DNA on the watch. Agent Hardy further testified that the Defendant and another unknown individual could not be excluded as minor contributors to the blood DNA taken from the watch. Agent Hardy agreed that someone besides the victim may have worn the watch or touched the watch which would explain why another person's DNA profile was on the watch.

Based upon this evidence the jury convicted the Defendant of first degree premeditated murder, first degree felony murder, attempted especially aggravated burglary, and theft of property valued over $10,000. The trial court merged the first degree murder convictions and sentenced the Defendant to life in the Department of Correction for first degree murder. The trial court sentenced the Defendant to six years for attempted especially aggravated burglary and six years for theft of property valued over $10,000, and it ordered that those sentences run concurrently with each other but consecutively to the Defendant's life sentence.

## II. Analysis
### A. Lesser Included Offenses

The Defendant contends that the trial court erred when it failed to instruct the jury on the lesser-included offense of voluntary manslaughter. The State asserts that the Defendant has waived this issue because he did not raise the issue in either of his motions for a new trial. The State further contends that this Court should not conduct a plain error analysis in this case because the trial court properly determined that voluntary manslaughter should not be instructed as a lesser-included offense of first degree murder in this case, and any error regarding lesser-included offenses in this

case was harmless.

In the case under submission, the trial court found that, "We're not charging voluntary manslaughter as a lesser included offense, because there is no evidence to indicate that [the Defendant] was provoked in any way to commit it." Both the Assistant District Attorney General and defense counsel requested the trial court to provide a jury instruction regarding voluntary manslaughter as a lesser-included offense to the first degree murder charge. The trial court replied: "No, the only lesser included offenses where there's some evidence of it, the jury could find a person guilty of that, and there is no evidence whatsoever that, from which a jury could convict of voluntary manslaughter." At the close of trial, the trial court instructed the jury on felony murder, first degree murder, second degree murder, reckless homicide, and criminally negligent homicide.

After thoroughly reviewing the record, we conclude that this issue has been waived because the Defendant failed to include this issue in his motion for new trial. Tenn. R. App. P. 3(e) (stating that "in all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, . . . or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived"). Accordingly, the Defendant's failure to raise the issue in his motion for a new trial precludes our review of this issue, subject to our noticing "plain error." See Tenn. R. App. P. 3(e); Tenn. R. App. P. 36(a).

Issues that rise to the level of plain error lie within the sound discretion of the appellate court and may be considered: (1) to prevent needless litigation; (2) to prevent injury to the interests of the public; and (3) to prevent prejudice to the judicial process, prevent manifest injustice, or to do substantial justice. See Tenn. R. App. P. 13(b); Tenn. R. Crim. P. 52(b); State v. Adkisson, 899 S.W.2d 626, 638-39 (Tenn. Crim. App. 1994). In Adkisson, this Court stated that the following factors should be considered by an appellate court when determining whether an error constitutes "plain error": (a) the record must clearly establish what occurred at the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the issue is "necessary to do substantial justice." Adkisson, 899 S.W.2d at 641-42 (citations omitted). Our Supreme Court characterized the Adkisson test as a "clear and meaningful standard" and emphasized that each of the five factors must be present before an error qualifies as plain error. State v. Smith, 24 S.W.3d 274, 282-83 (Tenn. 2000).

In the case under submission, we will first consider whether a clear and unequivocal rule of law has been breached. The question of whether a given offense should be submitted to the jury as a lesser-included offense is a mixed question of law and fact. State v. Rush, 50 S.W.3d 424, 427 (Tenn. 2001) (citing State v. Smiley, 38 S.W.3d 521 (Tenn. 2001)). The standard of review for mixed questions of law and fact is de novo with no presumption of correctness. Id.; see State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999). The trial court has a duty "to give a complete charge of the law applicable to the facts of the case." State v. Davenport, 973 S.W.2d 283, 287 (Tenn. Crim. App. 1998) (citing State v. Harbison, 704 S .W.2d 314, 319 (Tenn. 1986)); see Tenn. R. Crim. P. 30.

In the case under submission, the Defendant was indicted for first degree murder, which is the "premeditated and intentional or knowing killing of another." Tenn. Code Ann. § 39-13-202(a) (2003). Voluntary manslaughter differs from first degree premeditated murder in that it is an "intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner." Id. § 39-13-211(a)(1). Voluntary manslaughter is a lesser-included offense of first degree murder. State v. Dominy, 6 S.W.3d 472, 477 n.9 (Tenn. 1999). However, trial courts are not required to instruct the jury on all lesser-included offenses of the charged offense. State v. Robert Lee Pattee, No. M2000-00257-CCA-R3-CD, 2001 WL 467903, at *10 (Tenn. Crim. App., at Nashville, May 3, 2001), *no Tenn. R. App. P. 11 application filed*.

"In applying the lesser-included offense doctrine, three questions arise: (1) whether an offense is a lesser-included offense; (2) whether the evidence supports a lesser-included offense instruction; and (3) whether an instructional error is harmless." State v. Allen, 69 S.W.3d 181, 187 (Tenn. 2002). In State v. Burns, 6 S.W.3d 453 (Tenn. 1999), our Supreme Court adopted the following two-step process for determining if the evidence justifies a jury instruction on the lesser-included offense:

> First, the trial court must determine whether any evidence exists that reasonable minds could accept as to the lesser-included offense. In making this determination, the trial court must view the evidence liberally in the light most favorable to the existence of the lesser-included offense without making any judgments on the credibility of such evidence. Second, the trial court must determine if the evidence, viewed in this light, is legally sufficient to support a conviction for the lesser-included offense.

Id. at 469.

The proof in this case did not support the lesser charge of voluntary manslaughter. There was no evidence in the record which reasonable minds could accept as to the lesser included offense. There was absolutely no evidence introduced that the Defendant killed the victim in a state of passion produced by adequate provocation to lead a reasonable person to act in an irrational manner. In fact, the Defendant did not testify, and he did not present any proof. The record established that the Defendant told Fender, "The fat b*tch is coming down," a few days before the victim's murder and that, as Calle drove the Defendant to visit the victim, the Defendant told Calle that he was "going to unload" on the victim. The evidence shows that the Defendant waited for the victim to arrive at her home and then killed the victim by stabbing her fifteen times with a serrated kitchen knife. Therefore, the trial court properly concluded that the record contains no evidence that, at the time of the killing, the Defendant was "in a state of passion produced by adequate provocation" resulting in his acting "in an irrational manner."

Even if the lesser-included offense of voluntary manslaughter should have been charged, the

failure to charge voluntary manslaughter was harmless beyond a reasonable doubt. In State v. Williams, 977 S.W.2d 101, 105 (Tenn. 1998), our Supreme court noted that a trial court's erroneous failure to charge on a lesser included offense does not automatically result in reversal. In Williams, the trial judge instructed the jury as to the charged offense of first degree murder and the lesser-included offenses of second degree murder and reckless homicide, and the jury convicted the Defendant of first degree murder. Id. at 104. The defendant argued that the trial judge erred by failing to instruct on voluntary manslaughter. The majority in Williams explained that any error was harmless and stated:

> By convicting the defendant of first degree murder the jury determined that the proof was sufficient to establish all the elements of that offense beyond a reasonable doubt, including that the killing was "intentional, deliberate and premeditated." In other words, by finding the defendant guilty of the highest offense to the exclusion of the immediately lesser offense, second degree murder, the jury necessarily rejected all other lesser offenses, including voluntary manslaughter. Accordingly, the trial court's erroneous failure to charge voluntary manslaughter is harmless beyond a reasonable doubt because the jury's verdict of guilt on the greater offense of first degree murder and its disinclination to consider the lesser included offense of second degree murder clearly demonstrates that it certainly would not have returned a verdict on voluntary manslaughter.

Id. at 106.

The Williams rationale applies to the case under submission in that the jury in this case convicted the Defendant of first degree premeditated murder and first degree felony murder despite the trial court's instructions on second degree murder, reckless homicide, and criminally negligent homicide. In rejecting the instruction on second degree murder, which entails the "knowing killing of another," and, by choosing to convict the Defendant of an intentional killing, the jury also rejected all other lesser included offenses, including voluntary manslaughter. See State v. Wilson, 92 S.W.3d 391 (Tenn. 2002). Here, the jury's verdict demonstrates that the Defendant suffered no prejudice from the trial court's failure to charge the lesser-included offense. Therefore, we hold that any alleged error regarding the failure to instruct on voluntary manslaughter was harmless, and the Defendant is not entitled to relief on this issue.

**B. Change of Venue**

The Defendant contends that the trial court abused its discretion when it denied the Defendant's motion for a change of venue. The State contends that the Defendant failed to adequately provide citations to the record to support an allegation that the jury was prejudiced by pretrial publicity. The State further contends that the record supports the trial court's decision to deny the Defendant's motion for a change of venue, and the trial court did not abuse its discretion.

The Defendant filed a motion for a change of venue in August of 2004, alleging that a great

deal of pretrial publicity about this crime was generated in the Hamilton County area where the case was tried. The Defendant attached several media articles from various sources which provide information regarding facts about the victim's death and the ensuing investigation that lead to the Defendant's arrest. One article notes that the Defendant was found due to detectives' "hard work and solid leads." A few articles describe the Defendant as a homeless drifter and a known violent felon, and other articles refer to Defendant's criminal history and status as an illegal immigrant.

The trial court held a hearing on the motion for change of venue and held:

> My experience has been normally that we can get a jury in spite of the publicity that's been in the media . . . . But I'm going to deny your request. If, . . . . during jury selection it becomes obvious that too many of the jurors know something about the case or could, have already formed an opinion about it, we'll change it at that time . . . . We'll first voir dire the whole panel to be sure that anybody that's heard anything at all about the case, we will then individually voir dire them.

The trial court agreed to sequester the jury.

Before voir dire began, the trial court explained that:

> [W]hat I will do, I'll ask in general, and if any, anybody indicates they've heard anything about it [this case] just by a show of hands so that you can question them individually . . . . I don't think we're going to find that, that most people do not read the paper and do not keep up. They don't even watch television news. But as I say, you need to explore it."

The transcript next states that "the jury was selected, impaneled and duly accepted by both sides. The appellate record does not contain a transcript of the jury selection proceedings, and there is no evidence regarding the events during voir dire.

First, we note that the Defendant does not cite to the record or provide any citation to any legal authority. Issues that are not adequately briefed are deemed waived. Tennessee Court of Criminal Appeals Rule 10(b) states that "[i]ssues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court." See also Tenn. R. App. P. 27(a)(7). Accordingly, we conclude that the Defendant has risked waiving this issue. However, we will consider this issue on its merits.

Rule 21 of the Tennessee Rules of Criminal Procedure provides as follows:

> In all criminal prosecutions the venue may be changed upon motion of the defendant, or upon the court's own motion with the consent of the defendant, if it appears to the court that, due to undue excitement against the defendant in the county where the offense was committed or any other cause, a fair trial probably could not be had.

Whether to grant a motion for a change of venue lies within the discretion of the trial court, and such a decision will not be overturned on appeal absent a showing of abuse of discretion. State v. Howell, 868 S.W.2d 238, 249 (Tenn. 1993). Jurors need not be totally ignorant of the facts and issues involved in a case upon which they are sitting, but they must be able to lay aside their opinions or impressions and render a verdict based upon the evidence presented. State v. Bates, 804 S.W.2d 868, 877 (Tenn. 1991). The test is "whether the jurors who actually sat and rendered verdicts were prejudiced by the pretrial publicity." State v. Kyger, 787 S.W.2d 13, 18-19 (Tenn. Crim. App. 1989). This Court has noted that:

> "[E]xtensive knowledge in the community of either the crimes or the putative criminal is not sufficient by itself to render a trial unconstitutionally unfair," and the court may not presume unfairness based solely upon the quantity of publicity "in the absence of a 'trial atmosphere . . . utterly corrupted by press coverage.'"

State v. Crenshaw, 64 S.W.3d 374, 387 (Tenn. Crim. App. 2001) (quoting Dobbert v. Florida, 432 U.S. 282, 303 (1977) (quoting Murphy v. Florida, 421 U.S. 794, 798 (1975)). The burden of proof is on the Defendant to show that the jurors were biased or prejudiced against him. Id.; see also State v. Garland, 617 S.W.2d 176, 187 (Tenn. Crim. App. 1981).

Relevant factors to consider in determining whether to grant a motion for a change of venue include:

1. Nature, extent, and timing of pre-trial publicity.
2. Nature of publicity as fair or inflammatory.
3. The particular content of the publicity.
4. The degree to which the publicity complained of has permeated the area from which the venire is drawn.
5. The degree to which the publicity circulated outside the area from which the venire is drawn.
6. The time elapsed from the release of the publicity until the trial.
7. The degree of care exercised in the selection of the jury.
8. The ease or difficulty in selecting the jury.
9. The veniremen's familiarity with the publicity and its effect, if any, upon them as shown through their answers on voir dire.
10. The defendant's utilization of his peremptory challenges.
11. The defendant's utilization of his challenges for cause.
12. The participation by police or by prosecution in the release of publicity.
13. The severity of the offense charged.
14. The absence or presence of threats, demonstrations or other hostility against the defendant.
15. Size of the area from which the venire is drawn.
16. Affidavits, hearsay, or opinion testimony of witnesses.
17. Nature of the verdict returned by the trial jury.

State v. Hoover, 594 S.W.2d 743, 746 (Tenn. Crim. App. 1979). The absence of the voir dire in the record prevents us from assessing these factors. "In the absence of a complete record, we must presume that the trial court correctly denied the motion for a change of venue." Crenshaw, 64 S.W.3d at 387.

In the case under submission, the trial court did not abuse its discretion when it denied the Defendant's motion for a change of venue. The appellate record does not contain a transcript of the jury selection proceedings, and there is no evidence in the record that any jurors were biased or prejudiced against the Defendant due to pretrial publicity. The Defendant fails to provide any evidence to establish that any of the jurors who sat on his case were even exposed to, let alone prejudiced by, any pretrial publicity. In fact, the trial court observed that no one on the jury knew anything about this case, which indicates that none of the jurors had any exposure to the pretrial publicity. As previously discussed, for the Defendant to prevail on this issue, he ". . . must demonstrate that the jurors who actually sat were biased or prejudiced against him." See Evans, 838 S.W.2d at 192. The record contains absolutely no evidence from which we may conclude that the jurors were tainted. The defendant has failed to prove that the pretrial publicity "utterly corrupted the trial atmosphere." Crenshaw, 64 S.W.3d at 387. We conclude that the trial court did not abuse its discretion when it denied the Defendant's motion for a change of venue. The Defendant is not entitled to relief on this issue.

### C. Admission of Items into Evidence

The Defendant contends that the trial court erred when it admitted into evidence a knife set found at the victim's home and certain photographs of the victim at the crime scene. The State contends that the trial court did not abuse its discretion when it admitted these items into evidence.

#### 1. Knife Set

The Defendant contends that the trial court erred when it admitted a knife set into evidence. Specifically, the Defendant argues that the knife set was irrelevant because several different possibilities could account for a missing knife besides the State's theory that the missing knife was used as the murder weapon. The Defendant further argues that, because the murder weapon was not required to prove murder in this case, the fact that a knife was missing from the knife set was not a fact of consequence and was, therefore, irrelevant. The Defendant also argues that any probative value gained by introducing the knife set into evidence was substantially outweighed by unfair prejudice, confusion of the issues, and the potential to mislead the jury. The State argues that the Defendant waived this issue because he failed to contemporaneously object to the introduction of the knife set during trial. The State further contends that the the trial court did not abuse its discretion when it admitted the knife set into evidence because the knife set was relevant and was not prejudicial to the Defendant.

Before trial, defense counsel objected to the introduction of a knife set as evidence. Defense

counsel argued that the State had not been able to find the weapon that was used and had no evidence regarding the knife missing from the knife set. The State countered that the knife set was relevant because a knife was missing from this set, and the perpetrator of this homicide used a knife. At trial, the State moved to introduce the knife set into evidence, and the Defendant did not object when the knife set was introduced into evidence.

We first note that the Defendant did not waive this issue because he raised this issue pretrial, and there is no further requirement that he again voice his objection during the trial. See State v. Brobeck, 751 S.W.2d 828, 833-34 (Tenn. 1988). Therefore, we turn to address this issue on its merits.

In Tennessee, the determination of whether proffered evidence is relevant in accordance with Tennessee Rule of Evidence 402 is left to the sound discretion of the trial judge, as is the determination of whether the probative value of evidence is substantially outweighed by the possibility of prejudice pursuant to Tennessee Rule of Evidence 403. State v. Kennedy, 7 S.W.3d 58, 68 (Tenn. Crim. App. 1999) (citing State v. Forbes, 918 S.W.2d 431, 449 (Tenn. Crim. App. 1995) and State v. Burlison, 868 S.W.2d 713, 720-21 (Tenn. Crim. App. 1993)). In making these decisions, the trial court must consider the questions of fact that the jury will have to consider in determining the accused's guilt as well as other evidence that has been introduced during the course of the trial. State v. Williamson, 919 S.W.2d 69, 78 (Tenn. Crim. App. 1995). We will only disturb an evidentiary ruling on appeal when it appears that the trial judge arbitrarily exercised his or her discretion. State v. Baker, 785 S.W.2d 132, 134 (Tenn. Crim. App. 1989).

Initial questions of admissibility of evidence are governed by Tennessee Rules of Evidence 401 and 403. These rules require that the trial court must first determine whether the proffered evidence is relevant. Pursuant to Rule 401, evidence is deemed relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less than it would be without the evidence." Tenn. R. Evid. 401. In other words, "evidence is relevant if it helps the trier of fact resolve an issue of fact." Neil P. Cohen, et al., Tennessee Law of Evidence § 4.01[4], at 4-8 (4th ed. 2000). If the trial court finds that the proffered evidence is relevant, it then weighs the probative value of that evidence against the risk that the evidence will unfairly prejudice the trial. State v. James, 81 S.W.3d 751, 757 (Tenn. 2002). If the court finds that the probative value is substantially outweighed by its prejudicial effect, the evidence may be excluded. Tenn. R. Evid. 403. "'Excluding relevant evidence under this rule is an extraordinary remedy that should be used sparingly and persons seeking to exclude otherwise admissible and relevant evidence have a significant burden of persuasion.'" James, 81 S.W.3d at 757-58 (quoting White v. Vanderbilt Univ., 21 S.W.3d 215, 227 (Tenn. Ct. App. 1999)).

In the case under submission, we conclude that the trial court did not abuse its discretion when it admitted the knife set into evidence. The admission of the knife set was relevant to show where the Defendant might have obtained the murder weapon. Dr. Kessler's testimony established that the perpetrator of the crime used a serrated knife to kill the victim, and Lieutenant Wilson's testimony established that a knife set with a missing knife was found inside the victim's home.

Although the State did not need to address the issue of the murder weapon in order to prove murder, such evidence was useful to show how the murder may have occurred and to show a knife similar to the actual murder weapon. The Defendant's contentions about the various explanations for the absence of the missing knife may well be proper considerations for the trial court in determining the probative value of such evidence. And, as previously stated, the trial court must weigh the probative value against the danger of prejudice or confusion in order to determine admissibility under Rule 403 of the Tennessee Rules of Evidence. We disagree with the Defendant's contentions that the introduction of the knife set into evidence resulted in unfair prejudice, confusion of the issues, or the potential to mislead the jury. In our view, the State was properly permitted to present a theory regarding the origin of the murder weapon, and evidence to support that theory. The trial court did not abuse its discretion when it admitted the knife set into evidence, and the Defendant is not entitled to relief on this issue.

**2. Photographs of the Victim**

The Defendant contends that the trial court abused its discretion when it admitted photographs of the victim at the crime scene into evidence. The Defendant admits that these pictures were "undoubtedly" relevant but contends that any probative value that the pictures may have had is substantially outweighed by unfair prejudice, confusion of the issues, and the potential to mislead the jury. The State contends that the trial court did not abuse its discretion when it admitted these photographs into evidence.

At trial, Officer Johnson identified numerous photographs of the victim's house interior. He described the locations of the computer room and computer room closet and explained where the victim's body was found in relation to those locations. He also identified Exhibit 19, a diagram of the position of things in the computer room with a few small photographs showing the victim's body lying face-down and the victim's hair next to a small amount of blood. These photographs are 1.5 inches long and less than 2 inches wide. Defense counsel objected to this diagram and stated: "I think it shows hair that was on her head. I think it shows her head and the bloody area around that and all . . . . I don't see any purpose in that. The diagram itself, obviously they've already got that in." The State countered that, "This is a diagram of the position of things in the computer room and there's some small photographs showing the body, but nothing particularly graphic, nothing particularly outrageous. It's nothing worse than you see on [television]." The trial court overruled the objection, stating, "No, a picture is worth a thousand words, so – and it's not prejudicial to your client."

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The determination of the admissibility of photographs lies within the sound discretion of the trial court. State v. Harris, 839 S.W.2d 54, 73 (Tenn. 1992); State v. Evans, 838 S.W.2d 185, 193 (Tenn. 1992); see Neil P. Cohen, et al., Tennessee Law of Evidence, § 4.01[17][a], at 4-36 (4th ed. 2000). The decision of the trial court to admit a photograph into evidence "will not be overturned on appeal absent a clear showing of an abuse of discretion." State v. Vann, 976 S.W.2d 93, 103 (Tenn. 1998); see State v. Cazes, 875 S.W.2d 253, 262-63 (Tenn. 1994). To be admissible, a photograph must be relevant to some issue at trial and the danger of unfair prejudice, confusion of

the issues, or misleading the jury must not substantially outweigh its probative value. Tenn. R. Evid. 403; State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978); see Cohen, supra, § 4.01[17][d], at 4-38. The term "unfair prejudice" has been defined as "[a]n undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Banks, 564 S.W.2d at 951 (quoting Fed. R. Evid. 403). This Court has explained that:

> Prejudice becomes unfair when the primary purpose of the evidence at issue is to elicit emotions of "bias, sympathy, hatred, contempt, retribution, or horror." Murder is an absolutely reprehensible crime. Yet our criminal justice system is designed to establish a forum for unimpaired reason, not emotional reaction. Evidence which only appeals to sympathies, conveys a sense of horror, or engenders an instinct to punish should be excluded.

State v. Collins, 986 S.W.2d 13, 20 (Tenn. Crim. App. 1998) (citations omitted). In State v. Thomas, 158 S.W.3d 361, 394 (Tenn. 2005), our Supreme Court held that the trial court did not abuse its discretion in admitting certain post-mortem photographs of the victim and stated: "Although the photographs are not particularly pleasant to view, neither are they particularly gruesome. We find that the probative value of the photographs is not outweighed by their prejudicial effect and the trial court did not abuse its discretion in allowing their admission."

In the case under submission, the trial court did not abuse its discretion when it admitted the small photographs in question into evidence. As the Defendant has conceded, the photographs at issue were clearly relevant. The purpose of introducing these photographs into evidence was to assist the trier of fact. Officer Johnson testified that the diagram and the small photographs in the diagram accurately depicted how the crime scene looked when he entered the computer room where the victim was found. We believe that accurately reconstructing the crime scene is necessary to assist the trier of fact in understanding exactly how the crime at issue occurred. The probative value of the photographs in this case is not outweighed by their prejudicial effect. These small photographs were used to reconstruct the crime scene and were not overly graphic. These photographs showed the victim lying face-down on the floor and a lock of the victim's hair next to a small amount of blood on the carpet. The Defendant claims that the photographs show the victim lying in a pool of blood. However, our review of the record revealed that the photographs merely show a small amount of blood spattered around the victim's head. Because the probative value of the photographs in this case is not outweighed by their prejudicial effect, the trial court did not abuse its discretion in allowing their admission. The Defendant is not entitled to relief on this issue.

**D. Sentencing**

The Defendant contends that the trial court erred when it imposed the maximum sentences in the range for attempted especially aggravated burglary and theft of property valued over $10,000 and ordered that these sentences run consecutively to his life sentence. Specifically, the Defendant contends that the trial court failed to make the required findings to support the sentences that it imposed. The Defendant argues that his case should be remanded in order for the trial court to set

forth its basis for its sentencing decisions. The Defendant further argues that the evidence presented at the sentencing hearing is insufficient to support the trial court's decision to impose the maximum sentences in the range for attempted especially aggravated burglary and theft of property valued over $10,000 and to order that these sentences run consecutively to his life sentence.[1] The State contends that the trial court properly sentenced the Defendant.

At the sentencing hearing, the following evidence was presented: the State introduced the presentence report and certified copies of the Defendant's convictions from New York and Vermont. The State described the Defendant's previous convictions from New York which include unlawful imprisonment, aggravated harassment, and sexual abuse. The State explained that the charging document for the Defendant's conviction for unlawful imprisonment, second degree, alleged that the Defendant pulled a knife on the victim and threatened to kill her, cut her up, and put her in a box. The State also described the Defendant's conviction for aggravated harassment and stated that the Defendant threatened to kill the victim. The State explained that the charging document for the sexual abuse, second degree, offense indicated that the Defendant fondled a twelve-year-old female while inside a school. The State introduced a certified copy of the Defendant's conviction for domestic assault from Vermont.

The State argued that the Defendant should receive the maximum sentence for the range because: (1) the Defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range; (2) the defendant treated or allowed the victim to be treated with exceptional cruelty during the commission of the offense; (3) the defendant possessed a firearm, explosive device or other deadly weapon during the commission of the offense; and (4) the defendant had no hesitation about committing a crime when the risk to human life was high. The Defendant did not allege that any mitigating factors applied to his case. The trial court merged the Defendant's first degree murder convictions and sentenced the Defendant to life in the Department of Correction for first degree murder. The trial court sentenced the Defendant, as a Range I offender, to the maximum punishment within the range, six years, for the Class C felony, attempted especially aggravated burglary, conviction. The trial court similarly imposed a six year sentence for the Class C felony theft of property valued over $10,000 conviction. The trial court then ordered that these sentences run concurrently with each other but consecutively to the life sentence.

**1. Class C Felony Sentences**

The Defendant contends that the trial court failed to make adequate findings of fact and failed

[1]A footnote in the Defendant's brief explains that the State asked the trial court to treat the Defendant's prior New York misdemeanor conviction for sexual abuse, second degree, as a felony because in Tennessee this crime would be considered aggravated sexual battery, a Class B felony. In this footnote, the Defendant contends that this Court should remand the case for resentencing because the trial court made no finding with respect to this issue. As we will discuss in the sections below, the Defendant's criminal history is sufficiently extensive to justify the imposition of his sentence whether this offense is considered as a prior felony or as a prior misdemeanor.

to explain what enhancement factors apply to the Defendant's sentences. The Defendant argues that his case should be remanded in order for the trial court to set forth its basis for its sentencing decisions. The Defendant also contends that the evidence presented at sentencing is insufficient to support the maximum sentence for the range. The State argues that the enhancement of the Defendant's sentence was proper under Tennessee Code Annotated section 40-35-114(1),(5),(9), and (13) (2003 & Supp. 2005).[2]

When a defendant challenges the length, range or the manner of service of a sentence, it is the duty of this court to conduct a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." Tenn. Code Ann. § 40-35-401(d) (2003). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ross, 49 S.W.3d 833, 847 (Tenn. 2001); State v. Pettus, 986 S.W.2d 540, 543 (Tenn. 1999); State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court which are predicated upon uncontroverted facts. State v. Dean, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); State v. Butler, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); State v. Smith, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994).

In conducting a de novo review of a sentence, we must consider: (a) any evidence received at the trial and/or sentencing hearing; (b) the presentence report; (c) the principles of sentencing; (d) the arguments of counsel relative to sentencing alternatives; (e) the nature and characteristics of the offense; (f) any mitigating or enhancement factors; (g) any statements made by the defendant on his or her own behalf; and (h) the defendant's potential or lack of potential for rehabilitation or treatment. See Tenn. Code Ann. § 40-35-210(b) (2003); State v. Taylor, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001). The party challenging a sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Cmts.

At the time of the Defendant's sentencing hearing on January 31, 2005, the law mandated that in the absence of enhancement and mitigating factors, the presumptive length of a sentence for a Class C felony was the minimum sentence in the statutory range.[3] Tenn. Code Ann. § 40-35-210(c) (2003). In order to determine the appropriate range of a sentence, the trial court shall consider, among other things, enhancing and mitigating factors. Tenn. Code Ann. § 40-35-210(b)(5). Whenever the court imposes a sentence, it shall place on the record either orally or in writing what

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[2]We note that we use the numbering for the enhancement factors as designated by Tennessee Code Annotated section 40-35-114 (2003 & Supp. 2005).

[3]We note that, effective June 7, 2005, this statute was amended, and the portion of the statute that mandated that the presumptive sentence was the minimum in the range was changed. The newly enacted statute mandates that a trial "court shall impose a sentence within the range of punishment determined . . . ." Tenn. Code Ann. 40-35-210(c) (2003 & Supp. 2005).

enhancement or mitigating factors it found, if any, as well as findings of fact as required by other sections of the Tennessee Code. Tenn. Code Ann. § 40-35-210(f). The weight given to each factor is within the trial court's discretion provided that the record supports its findings and it complies with the Sentencing Act. State v. Carter, 908 S.W.2d 410, 412 (Tenn. Crim. App. 1995); State v. Shelton, 854 S.W.2d 116, 122 (Tenn. Crim. App. 1992). The trial record must contain specific findings of fact to support the sentence, as well as any enhancement or mitigating factors used to arrive at that sentence. Tenn. Code Ann. §§ 40-35-209(c), -210(f). Thus, if the trial court wishes to enhance a sentence, the court must state its reasons on the record. The purpose of recording the court's reasoning is to guarantee the preparation of a proper record for appellate review. State v. Ervin, 939 S.W.2d 581, 584 (Tenn. Crim. App. 1996). In the event the record fails to demonstrate the appropriate consideration by the trial court, appellate review of the sentence is purely de novo. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). If our review reflects that the trial court properly considered all relevant factors and the record adequately supports its findings of fact, this court must affirm the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In the case under submission, the trial court failed to note what enhancement or mitigating factors it found. The trial court made the following statements when it sentenced the Defendant:

> [The Defendant] was found guilty by the jury of attempt to commit especially aggravated burglary, a Class C felony. He does face three to six years. The [c]ourt will set the punishment at six years.
>
> . . . [H]e was found guilty by the jury of theft over $10,000. He is a Range I offender facing three to six. The [c]ourt will set that at six years, and the [c]ourt will make those two run concurrent but consecutive to the life sentence.

Because the trial court did not make any findings relevant to the applicable enhancement factors, we review the Defendant's sentence de novo without the presumption of correctness.

After reviewing the record, we conclude that the evidence presented at the sentencing hearing establishes that the Defendant should serve the maximum sentence in the range for his Class C felony convictions. The evidence shows that the Defendant's sentence was properly enhanced under enhancement factor (2), the defendant has a previous history of criminal convictions and criminal behavior in addition to those necessary to establish the appropriate range. See Tenn. Code Ann. § 40-35-114(2). The Defendant's pre-sentence report and the testimony at the Defendant's sentencing hearing indicated that the Defendant has had at least four prior misdemeanor convictions that involved violence or threats of violence. The Defendant was convicted of the following offenses: second degree sexual abuse of a twelve-year-old, second degree unlawful imprisonment, aggravated harassment, and domestic assault. This Court finds that these convictions are in addition to what is necessary to put the Defendant into the appropriate range, and, based upon their violent nature, these convictions justified the trial court's decision to sentence the Defendant to six years on each of the Class C felonies. We note that misdemeanor convictions alone may support application of enhancement factor (2). See State v. Ramsey, 903 S.W.2d 709, 714 (Tenn. Crim. App. 1995); State

v. Jackie J. Porter, No. W2004-02012-CCA-R3-CD, 2005 WL 2860255, at *3 (Tenn. Crim. App., at Jackson, Oct. 31, 2005) (upholding the enhancement of the Defendant's sentence under enhancement factor (2) due to the Defendant's two prior misdemeanor convictions for theft of property under $500, and one conviction of for simple possession of marijuana), *no Tenn. R. App. P. 11 application filed*; State v. Richard Warren, No. M2001-02139-CCA-R3-CD, 2003 WL 354505, at *4 (Tenn. Crim. App., at Nashville, Feb. 14, 2003), *no Tenn. R. App. P. 11 application filed*. Because the Defendant's prior convictions justify the enhancement of his sentences to six years for each Class C felony under Tennessee Code Annotated section 40-35-114(2), we conclude that the Defendant is not entitled to relief on this issue.

Additionally, enhancement of the Defendant's sentence was appropriate under enhancement factors (6) and (10). See Tenn Code Ann. § 40-35-114(6) and (10). Enhancement was appropriate under (6), the defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense, because the evidence at trial established that the Defendant stabbed the victim fifteen times with a serrated knife and left her to bleed to death in her home. By leaving the victim to suffer from extreme pain and terror while bleeding to death, the Defendant exhibited exceptional cruelty that went well beyond any cruelty inherent in the nature of the crime itself. Enhancement factor (10), the defendant possessed or employed a firearm, explosive device or other deadly weapon during the commission of the offense, applies to this case because the Defendant used a serrated knife, which is clearly a deadly weapon, to commit the crime. Accordingly, we conclude that the Defendant was appropriately sentenced.

**2. Consecutive Sentences**

The Defendant also contends that the evidence presented at sentencing is insufficient to support the imposition of consecutive sentences. The State argues that this Court should affirm the trial court's imposition of consecutive sentences.

Pursuant to Tennessee Code Annotated section 40-35-115(a) (2003), if a defendant is convicted of more than one criminal offense, the court shall order the sentences to run either consecutively or concurrently. The trial court may order sentences to run consecutively if the court finds by a preponderance of the evidence any one of certain criteria enumerated in Tennessee Code Annotated section 40-35-115(b)(1)-(7). One such criteria is that the defendant is an offender whose record of criminal activity is extensive. Tenn. Code Ann. § 40-35-115(b)(2). In addition to the specific criteria in Tennessee Code Annotated section 40-35-115(b), consecutive sentencing is guided by the general sentencing principles providing that the length of a sentence be "justly deserved in relation to the seriousness of the offense" and "no greater than that deserved for the offense committed." Tenn. Code Ann. §§ 40-35-102(1) and-103(2); State v. Imfeld, 70 S.W.3d 698, 707 (Tenn. 2002).

After reviewing the record, we conclude that the evidence supports the trial court's determination that the Defendant's sentences for his Class C felony convictions should run consecutively to his conviction of first degree murder. A finding of any one of the factors in

Tennessee Code Annotated section 40-35-115 can justify the imposition of consecutive sentences. See State v. Darrell E. Pointer, No. M2005-01743-CCA-R3-CD, 2006 WL 1222713, at *3 (Tenn. Crim. App., at Nashville, May 5, 2006), *no Tenn. R. App. P. 11 application filed*. In the case under submission, Tennessee Code Annotated section 40-35-115(b)(2) (2003) applies due to the Defendant's extensive criminal history. As previously discussed, the record in this case supports the conclusion that the Defendant's criminal record is extensive due to the Defendant's prior convictions. This is a sufficient basis for the determination that the Defendant was an offender whose record was extensive and for the imposition of consecutive sentences. See State v. Mark Crites, No. 01C01-9711-CR-00512, 1999 WL 61053, *6 (Tenn. Crim. App., at Nashville Feb. 9, 1999) (noting that Tennessee Code Annotated section 40-35-115(b)(2) does not distinguish between misdemeanor and felony convictions and upholding the trial court's decision to impose consecutive sentences due to the defendant's prior misdemeanor convictions), *no Tenn. R. App. P. 11 application filed*. Furthermore, in our view, the Defendant's aggregate sentence is reasonably related to the severity of these offenses. The Defendant is not entitled to relief on this issue.

## III. Conclusion

In accordance with the forgoing authorities and reasoning, we affirm the judgments of the trial court.

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ROBERT W. WEDEMEYER, JUDGE